IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. [redacted] 161

DORA SUROWITZ, Individually and on behalf of all other similarly situated shareholders of HILTON HOTELS CORPORATION,

Petitioner,

vs.

HILTON HOTELS CORPORATION, a corporation, CONRAD N. HILTON, ROBERT P. WILLIFORD, ROBERT J. CAVERLY, JOSEPH P. BINNS, SPEARL ELLISON, HENRY CROWN, HORACE C. FLANIGAN, BENNO M. BECHTOLD, Y. FRANK FREEMAN, WILLARD W. KEITH, LAWRENCE STERN, SAM D. YOUNG, FRITZ B. BURNS, VERNON HERNDON, HERBERT C. BLUNCK, CHARLES L. FLETCHER, ROBERT A. GROVES, JOSEPH A. HARPER, BARRON HILTON and HILTON CREDIT CORPORATION, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SIDNEY M. DAVIS,
280 Park Avenue,
New York, N. Y. 10017,

RICHARD F. WATT,
WALTER J. ROCKLER,
DAVID R. KENTOFF,
105 West Adams Street,
Chicago, Illinois 60603,

ALAN J. ALTHEIMER,
LIONEL G. GROSS,
HOWARD L. KASTEL,
1 North La Salle Street,
Chicago, Illinois 60602,
Attorneys for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Dora Surowitz, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 11, 1965.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 342 F. 2d 596, and is reproduced in Appendix A to this Petition, pages 19-38 *infra*. The findings of fact and conclusions of law entered by the District Court, upon which the cause was dismissed, are contained in the Appendix to Plaintiff-Appellant's Brief filed in the Court of Appeals, at pages 145-58; nine copies of the Appendix have been filed with this Court.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 11, 1965. This Court has jurisdiction to review the judgment by a Writ of Certiorari under 28 U. S. C. Section 1254 (1), 62 Stat. 928.

QUESTIONS PRESENTED.

Petitioner brought a derivative suit in the federal district court as a shareholder acting on behalf of the defendant Hilton Hotels Corporation, alleging that the officers and directors had engaged in multiple violations of the federal securities acts and the corporation laws of the State of Delaware. Petitioner's suit was dismissed with prejudice on the ground that, because of her lack of knowledge and understanding of the basis of the suit, her verification under Rule 23(b) of the Federal Rules of Civil Procedure was false and a nullity. The Court of Appeals upheld this conclusion despite the fact that the verification was largely on information and belief; it further held that a verification which is "false" for lack of comprehension on the part of the plaintiff-verifier is tantamount to a sham complaint.

The questions presented are—

1. In light of the policy of the federal securities acts to protect the ignorant and the unknowledgeable, may a com-

plaint charging serious violations of the securities laws be dismissed because the plaintiff-stockholder in a derivative suit is ignorant and unknowledgeable?

2. Is a verification on information and belief under Rule 23(b) false because the plaintiff is unable to testify to the basis or theory of the suit or the positions and activities of the individual defendants?

3. If the verification is false in the unusual sense that the Court of Appeals found it to be, is a motion to dismiss the suit sustainable where the record discloses substantial evidence that the suit is well-founded and where it contains a verification under oath by counsel attesting that the allegations of the complaint are true?

4. If the verification is in any sense false, is dismissal of a derivative suit for failure to comply with the Rules, as specified in Rule 41(b), an appropriate or proper remedy?

STATUTES INVOLVED.

The statutes involved are Sections 10(b) and 9(a) and (e) of the Securities and Exchange Act of 1934 (15 U. S. C. 78j, 78i) and Sections 17(a) and 12(2) of the Securities Act of 1933 (15 U. S. C. 77q, 77l). These statutes are reprinted in Appendix B hereto, pages 39-41 *infra*. The case also involves the construction of Rules 11, 23(b) and 41(b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE.

This suit was filed by Dora Surowitz, a shareholder in defendant Hilton Hotels Corporation, on behalf of herself and other shareholders, charging that the officers and directors of the Corporation had defrauded it and its stockholders of large sums of money, contrary to their fiduciary obligations and in violation of the Securities Act of 1933,

the Securities Exchange Act of 1934, and certain provisions of the Delaware corporation law (App. 1-63). Petitioner alleged that the officers and directors acted improperly and unlawfully in connection with two transactions: (1) the offer to purchase and the purchase by the Corporation of 300,000 shares of its own common stock, including over 100,000 shares owned by officers and directors; and (2) the offer to purchase and the purchase by the Corporation of approximately 1,058,000 shares of defendant Hilton Credit Corporation stock, including over 631,000 shares held by officers and directors of the Hotels Corporation. The Complaint charged that the Corporation thus was caused unnecessarily to expend almost $12,000,000, of which approximately $4,800,000 was paid to the officers and directors.

The theory of the Complaint is that these two stock-purchase transactions lacked any proper corporate purpose and were intended by the officers and directors to enable certain insiders, particularly Conrad Hilton and Henry Crown and members of their families, to sell their shares at higher prices than could be obtained on the market. To accomplish their purpose, the Complaint charged, the individual defendants made or caused to be made numerous false and misleading statements and failed to disclose relevant information to the Corporation's shareholders. They thus succeeded in selling to Hilton Hotels Corporation shares of stock they held in that Corporation and in the Credit Corporation at very favorable prices, at a time when they knew or should have known that the business affairs of the Hotels Corporation would shortly lead to a substantial drop in the value of its shares, and at a time when the expenditure of large sums for the purchase of shares was detrimental to the welfare of the Corporation.

Prior to pleading, defendants took the deposition of Petitioner (App. 94-114). Relying upon the deposition, they moved to dismiss on two specific grounds: (1) that the

complaint was a sham pleading; and (2) that the Petitioner was not a proper party plaintiff (App. 117-118). Defendants filed an affidavit in support of their motion (App. 93), and Petitioner filed two affidavits in opposition (App. 120-143). Without hearing evidence, the District Judge granted defendants' motion, dismissing the cause on the ground that Petitioner's verification under Rule 23(b) was false, and on the further ground that Petitioner's counsel had filed false affidavits under Rule 39 of the Rules of the District Court for the Northern District of Illinois (App. 145-58).

THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals affirmed the dismissal,[1] declaring that "the court below correctly held that a pleading governed by Rule 23(b) is sham when it clearly appears that the ostensible verification is a mere formality without knowledgeable or informative comprehension in the party plaintiff whose verification gives it the breath of life." In reaching its admittedly novel and unprecedented conclusion (App. A 32 *infra*), the Court of Appeals apparently reasoned as follows:

1. If verification under Rule 23(b) is to be meaningful and is to furnish added assurance of the "legitimacy" of a complaint (App. A 36 *infra*), the plaintiff must have a knowledge of his relationship to the suit, the official identities of the parties charged, and a general understanding of the foundation of the complaint (App. A 35 *infra*). Petitioner, a woman of little education, wholly lacking in financial comprehension, did not have any grasp of the offenses charged and could not identify the individual defendants in their corporate roles as officers and directors.

1. It held, however, that "so far as the order of dismissal rests upon the determination that the attorneys had violated Rule 39 of the court below, such a finding is wholly without evidentiary support and is clearly erroneous." (App. A. 27 *infra*.)

Her verification of the complaint was "without knowledgeable or informative comprehension" (App. A 37 *infra*). It was, therefore, "false" (App. A 34 *infra*). The verification, being "false" in this sense, made the complaint a sham (App. A 37 *infra*).

2. Neither counsel's certification by signing the complaint nor counsel's affidavit (App. 135-143) detailing the investigations conducted prior to filing the complaint and attesting to the truth of the complaint remedied the defect (App. A 25, 35, 37-38 *infra*).

3. The policy of the federal securities laws has nothing to do with the case (App. A 27-31 *infra*). That policy may be to protect the gullible and ignorant, but, since the case involves a derivative action, the plaintiff must verify. Petitioner is too ignorant to verify properly. Therefore, as an ignorant and inherently unfit stockholder, Petitioner is barred by Rule 23(b) from complaining of these securities acts violations.

4. The complaint is a sham even though many of the allegations are "obviously true and cannot be refuted" (App. A 36 *infra*). Indeed, although not a single allegation is shown to be false in any way, the complaint is a sham. The suit was properly dismissed with prejudice under Federal Rule 41(b) (failure to comply with court rules or orders) (App. A 38 *infra*).

5. In essence, therefore, the Court of Appeals held that, by reason of Petitioner's limited understanding and knowledge—defects inherent in her limited education, limited command of English, and limited knowledge of corporate and financial matters—"there was, in fact, no verification of this complaint."[2] Rule 23(b) requires that a plaintiff have

2. The Court refused to accept additional verification by counsel, a part of the record before the Court (App. 135, 142, 143), because it was filed in response to defendants' motion and not upon separate motion by the plaintiff or as an amendment to the complaint (App. A 37-38 *infra*).

communicable comprehension. Petitioner did not have it, and thus her suit is barred.

REASONS FOR GRANTING THE WRIT.

I. The decision of the Court of Appeals involves important issues as to the role of individual stockholders in the enforcement of causes of action under the Securities Acts.

In recent years liquid funds in corporate treasuries have accumulated to such an extent that, under various circumstances, they represent an attractive, indeed lucrative, market for the sale of the corporation's own securities.[3] Tenders to the corporation itself are phenomena of increasing frequency.[4] They apparently do not require registra-

3. Thus, total corporate net current assets in billions of dollars have increased as follows:

1945	51.6
1955	103.0
1960	128.6
1963	151.2

Corporate surpluses in billions of dollars have increased as follows:

1940	49.0
1950	129.4
1955	192.8
1960	268.6

U. S. Bureau of the Census, *Statistical Abstract of the United States*: 1964, p. 493 (Wash. 1964).

4. An examination of the records of the New York Stock Exchange indicates that tenders, whereby corporations purchase large quantities of their own shares, are becoming increasingly frequent. In the last four years, more than thirty listed corporations (other than Hilton Hotels) have resorted to the technique, including such companies as Martin-Marietta, Skelly Oil Co., United Fruit Co., Textron Corp., Houdaille Industries, Vulcan Materials Corp., and Litton Industries, Inc. In a substantial number of the tenders, it is understood that a particular officer or director will tender a specified number of shares or that any stockholder (including officers and directors) may tender. Without suggesting that any or all of these tenders involved impropieties, it seems clear that the practice calls for scrutiny upon the part of shareholders.

tions, prospectuses, and all the other complications and costs of secondary offerings by shareholders to the public. They are available when, as in 1962, the stock market is depressed. In some cases, as here, "bail-outs" may be attempted without even seeking stockholder approval. In light of the decision below, they may be invulnerable to stockholders' redress if the stockholders cannot personally understand or explain what the insiders have done.

On their face, the two transactions described in the complaint inevitably raise questions as to the propriety of the corporate actions. Given the facts pleaded, it would be naive to expect the Hilton Hotels Corporation to pursue its corporate remedies against the officers and directors who control it. If the transactions are to be looked into, and if the damage to the Corporation is to be remedied and the interests of the stockholders protected, the necessary initiative can only come from one of two sources: the Securities and Exchange Commission *or individual stockholders.*

One of the purposes of the Securities Act of 1933 and the Securities Exchange Act of 1934 was to enable stockholders, as ancillary enforcers, to initiate suits for violation of the substantive provisions of the Act. Remedial action could have been left entirely to the SEC. In fact, it was not. Section 12 of the 1933 Act and Section 9 of the 1934 Act specifically authorize individual suits by purchasers of securities; Section 10(b) of the 1934 Act and Section 17(a) of the 1933 Act have been held to support individual causes of action despite the absence of express language creating them. *Fratt* v. *Robinson*, 203 F. 2d 627 (9th Cir. 1953); *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783 (2d Cir. 1951); *Hooper* v. *Mountain States Securities Corporation*, 282 F. 2d 195 (5th Cir. 1960), cert. den. 365 U. S. 814 (1961); *Pfeffer* v. *Cressaty*, 223 F. Supp. 756 (S. D. N. Y. 1963). Where corporate funds are siphoned off by a bail-out

such as defendants allegedly planned and implemented in this case, using false, incomplete, and misleading communications to the stockholders in the process, the logical parties to bring the matter to court are individual stockholders.

The Court of Appeals acknowledged the strong policy of the securities laws to protect small investors (App. A. 27 *infra*). It implied, however, that the policy was not designed to protect a stockholder who *derivatively* seeks redress under the securities acts (App. A. 27-32 *infra*).[5] The Court of Appeals seems to suggest that, while an ignorant stockholder *qua* individual stockholder is protected by the Securities Acts, that protection does not extend to an ignorant stockholder asserting a *corporate* cause of action. But where the corporate treasury is raided by the controlling stockholders, officers, and directors, in violation of the securities laws, the rights of the corporation and its stockholders can realistically be protected *only by minority stockholders in a derivative suit*, because the plunderers control the corporation.

The decision of the Court of Appeals represents a significant impairment of the right of a stockholder to bring to court a corporate cause of action against insiders. Although the Court below recognizes that stockholders are proper instruments for bringing the cause to court, *it divides them into two classes:* Stockholders who have the capacity to understand corporate transactions *and those that do not.* Petitioner is so unsophisticated and lacking in understand-

5. In support of its view, the Court cited two decisions, *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (2d Cir. 1952), and *Slavin* v. *Germantown Fire Ins. Co.*, 174 F. 2d 799 (3rd Cir. 1949). Neither of these cases involved suits based on the abuse of using the corporation as a buyer or seller of securities. Rather, although the cases involved stockholders' suits, the corporations were not parties to the transactions complained of: other stockholders dealt in their securities with *third* persons.

ing that, although matters were read and explained to her, the Court concluded "that she had no conception of the matters read." (App. A. 37 *infra.*) In effect, therefore, the Court of Appeals approved the dismissal of a meritorious cause of action simply because Petitioner, the plaintiff-stockholder, was too limited to understand what she was told about it by her advisors.[6]

In this case, by a new form of "literacy test" imported into the Federal Rules, the Court pronounces the ignorant stockholder unfit for the protections of the securities laws.[7]

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6. Although the Court of Appeals relates the stockholder's ability to understand to an assurance of merit in the suit, the relationship is far from obvious. How is the good faith character of the action established by the stockholder's analytical capacity? If the plaintiff is very simple, limited in experience and outlook, and inarticulate, does this prove that the suit is worthless? If the plaintiff is clever and learns corporate lessons well, does this prove that the suit has merit?

Moreover, the Court of Appeals has left the necessary minimum quantum of comprehension dangerously undefined. Must the plaintiff-stockholder discover that minimum himself, or may he rely on counsel to furnish basic facts? Is the stockholder adequately informed if he states and believes simple conclusions but cannot support those conclusions by reference to any underlying facts? Further, may a stockholder rely on what his attorneys and advisors tell him and verify on information and a belief derived wholly from communications from them?

7. At least one District Court in the Seventh Circuit, hailing "this landmark decision", has regarded the decision of the Court of Appeals as a great aid in judicial administration because it will reduce the volume of corporate litigation. *Gagnon* v. *Buchanan, et al.*, No. 65-C-189, ND. Ill., comments of Chief Judge Campbell in dismissing the suit, April 15, 1965, on other grounds. When courts applaud new technical devices for dismissing good causes of action, *without considering the merits*, it is surely time to ask whether courts exist to dispense justice or simply to process, as in a production line, pieces of legal paper.

II. The decision of the Court of Appeals presents important and novel questions as to the proper interpretation of the Federal Rules of Civil Procedure, particularly Rules 23(b), 11, and 41(b).

So far as we can ascertain, no similar case has ever before been so decided by any federal court. The Court of Appeals admitted that the "crucial issue . . . namely, the interpretation of the verification of Rule 23(b), is without guiding precedent" (App. A. 32 *infra*). Moreover, it stated that it was deciding "a close question of law" (App. A. 32 *infra*).

The Court of Appeals held that a complaint may be sham, and therefore dismissible, in some sense other than shamness under Rule 11. There is no authority in the Federal Rules of Civil Procedure or in the decisions of any court to support this view. The Court of Appeals has clearly undertaken to make new law in an area of great importance under the Federal Rules.[8]

To achieve its result, the Court of Appeals interpreted Rule 23(b) in a fashion quite out of keeping with the Rule's history and purpose. The primary objective of the Rule was and is to prevent collusion by the corporation with a stockholder in order to permit the bringing of a corporate cause of action in a federal court on grounds of diversity of citizenship where the corporation, if it brought suit, could not meet the diversity requirement. *Hawes* v. *Oakland*, 104 U. S. 450 (1882); *City of Quincy* v. *Steel*, 120 U. S. 241 (1887); Equity Rule 94, 104 U. S. ix (1882); *Notes of Advisory Committee on the Rules*, Rule 23. The Rule addi-

8. Since verified complaints are required in several classes of cases other than those brought as derivative suits under Rules 23(b), the Court's concept of what is and what is not a sufficient degree of understanding to support a verification has a wide potential application. See, e.g., Rules 27(a), 65; Bankruptcy Act, 11 U. S. C. Sec. 41(c).

tionally serves to keep ordinary actions at law from being tried as suits in equity in the federal courts. The Court of Appeals stated that Rule 23(b) was "also designed to prohibit speculation in litigation and to protect the integrity of the invaluable instrument of a derivative suit" (App. A 31 *infra*). Furthermore, it considered that a purpose of the Rule was to protect the corporation and its directors "from ill-conceived, nuisance-value litigation" (App. A 31 *infra*).

Assuming that, taken together, these are all purposes of the Rule, it is obvious that not a single one of these objectives is served in any way by the dismissal of this cause. The suit is not collusive in any respect. There is not a shred of evidence to indicate that it involves "speculation in litigation." And finally, none of the defendants and neither the District Court nor the Court of Appeals so much as suggested that the suit is "ill-conceived, nuisance-value litigation." On the contrary, *all parties and both courts below recognized that the charges are serious and that the factual material pleaded in support is substantial.*

Thus Rule 23(b), even if its purposes are as broad as the Court of Appeals holds, is here being applied to cut off, without answer or a hearing on the merits, a cause of action which in no way represents a single one of the evils toward which Rule 23(b) is directed.

Actually, viewed from its origin, Rule 23(b)'s purposes are all accomplished by the verification of Petitioner in this cause. She is and has been a stockholder for a number of years (since 1957, five years before the transactions in question) (App. 96, 121, 125); she is a resident of New York (App. 94); she received the communications sent by Hilton Hotels Corporation having to do with the proposals to purchase stock (App. 109, 122); she signed a letter prepared by counsel and addressed to the Corporation pro-

testing the proposed transactions (App. 97, 116, 122); she discussed the subject of the corporation and its actions with her son-in-law and financial advisor, especially when the usual dividend was passed (App. 95-96, 109-112, 123-124); upon advice of her son-in-law and of legal counsel, she authorized the bringing of suit against the officers and directors (App. 123-124).[9] Moreover, she *knew* and *verified* as facts these essential allegations, which are *the allegations specifically called for under Rule 23(b);* she verified the other allegations upon belief in the information obtained by her son-in-law and by legal counsel and imparted to her by her son-in-law. Mrs. Surowitz' crime is that she could not understand all that she was told.

Clearly, Petitioner has the necessary *status* to act as the instrumentality for bringing the corporate cause of action to court. How can that *status* be taken away from her because of her inability to explain the complaint on deposition? In what fashion did Petitioner defy the Federal Rules so as to warrant summary dismissal under Rule 41(b)?

III. The decision of the Court of Appeals is in conflict with the view of derivative suits adopted by this Court in Koster v. Lumbermen's Mutual Casualty Co., 330 U. S. 518.

In the *Koster* case, a derivative suit initiated by a shareholder in New York was held to be properly dismissed on grounds of *forum non conveniens*, primarily because the

9. The Court of Appeals declared that "it affirmatively appears that plaintiff merely loaned her name to a suit which others desired to file . . ." (App. A 35 *infra*). The record does not support this inference. See App. 120-124. But even if Petitioner had improper motives, which is not charged, the right to maintain the action would not thereby be diminished. *Young* v. *Higbee*, 324 U. S. 204, 214 (1945); *Magida* v. *Continental Can Co., Inc.*, 231 F. 2d 843, 847-848 (2d Cir. 1956); *Hollander* v. *Breeze Corp., Inc.*, 131 N. J. Eq. 585, 589, 26 A. 2d 507, 511 (1941).

presence of the plaintiff-stockholder at the place of trial in New York (as opposed to Illinois, where the defendant company had its headquarters) was not necessary to the suit. It was urged by the defendants that the residence of the nominal plaintiff was unimportant since he was nothing but the instigator of the action on the part of the corporation. In adopting this view and in approving the granting of the motion, this Court recognized that the stockholder-plaintiff might "be a mere phantom plaintiff with interest enough to enable him to institute the action and little more." So far as the *state of his knowledge* was concerned, the Court noted that the stockholder-plaintiff may "make no showing of any knowledge by which his presence would help to make whatever case can be made on behalf of the corporation." 330 U. S. 518, 525.

Thus, in the *Koster* case, the all but *total lack of knowledge* on the part of the plaintiff-stockholder was held to justify requiring that the case be brought in a forum other than the one where he resided. Here, according to the Court of Appeals, *the same mental state* on the part of Petitioner—absence of knowledge—is held to constitute a defect fatal to the stockholder's right to sue at all.

The decision of the Court of Appeals refuses to recognize that *status as a stockholder* is what gives the individual stockholder the right to sue. It insists that a stockholder must have a degree of personal knowledge and understanding to come to court in the very kind of case widely recognized as primarily a "lawyer's case," in which "the facts are peculiarly within the defendants' knowledge and the sources of information are subject to their control." Hornstein, "Legal Controls for Intracorporate Abuse—Present and Future," 41 Col. L. Rev. 405, 416-417 (1941).

IV. The decision of the Court of Appeals is in conflict with the law prevailing in the Second Circuit.

Diligent research has uncovered only two decisions, both in the Second Circuit, that are reasonably close, in the nature of the problem presented, to the present case: *Murchison* v. *Kirby*, 27 F. R. D. 14 (S. D. N. Y. 1961), and *Freeman* v. *Kirby*, 27 F. R. D. 395 (S. D. N. Y. 1961). The Court of Appeals below took the view that neither "has any conceivable bearing upon the issue before us." This view is most difficult to understand.

In the *Murchison* case, the plaintiff stockholder sought to set aside as fraudulent the settlement of earlier derivative suits involving Alleghany Corporation. One defendant moved to strike the complaint as a sham, because the deposition of plaintiff Murchison indicated that he lacked personal knowledge of many of the allegations. At one point Murchison testified, "My information is not direct. I have asked my lawyers to see if it is possible to make a case out of this thing, and they tell me that they have. • • • I wasn't there, I wasn't listening to them, nobody has given me any written agreements about this deal, so my information is general." 27 F. R. D. 14, 19, note 10.

The defendant contended that, in view of the plaintiff Murchison's lack of knowledge, his attorneys had violated Rule 11 by permitting plaintiff to make a false verification of the complaint. Noting that the defendant's position appeared to be that a plaintiff who asserts a claim "must have personal knowledge of the basic facts upon which he predicates his suit," Judge Weinfeld denied the motion to dismiss as sham, commenting (27 F. R. D. 14, 18-19):

> In each instance, where Murchison testified as to lack of personal knowledge of a specific allegation, the defendant has seized upon the answer to charge that his attorneys and counsel permitted him, to use de-

> fendant's typical expression, "to make a false affidavit when he alleged paragraph 41 upon 'information,' the falsity of which paragraph they could have ascertained for themselves had they properly discharged their duty as attorneys by appropriate inquiry of Murchison.
>
> * * * * *
>
> Completely disregarded by the defendant is Murchison's testimony that the principal source of his knowledge of the allegations of the complaint was his attorneys and counsel, including reports submitted by them to him. Finally, and most important, since the basic question is whether the attorneys in good faith believed there was good ground to support the charges, there is the positive, unequivocal statement by the attesting attorney that before the commencement of the action he and his associates intensively investigated the facts upon which the complaint is based; that during his entire career as a lawyer he had never "spent greater time assuring myself of the existence of direct proof of the essential allegations of the complaint as I did prior to its signing. I not only assure this Court that I knew of 'good ground' to support this complaint when I signed it, but I am convinced that the Kirby-Ireland-Phillips conspiracy to defraud this Court will be proved.
>
> A pleading should be stricken only when it appears beyond peradventure that it is sham and false and that its allegations are devoid of factual basis; otherwise it would deprive a party of his right to a trial of the issues posed by his complaint—it would mean trial by affidavits.

Freeman v. *Kirby*, 27 F. R. D. 395 (S. D. N. Y. 1961), presents a markedly contrasting situation. There the attorney undertook virtually no investigation; rather, he relied entirely on two memoranda prepared by others and on a draft of the complaint in *Murchison* v. *Kirby*. Since counsel made no effort to inquire into the truth of the allegations, the court regarded his signature as little more than a "hollow gesture." Even this decision has been criticized as going

"beyond the boundaries established by prior federal and state decisions." 47 Virginia L. Rev. 1434, 1438 (1961).

The Court of Appeals for the Seventh Circuit in the present case has pioneered far beyond *Freeman* v. *Kirby*. It makes the test of shamness the plaintiff-stockholder's comprehension, not the attorney's efforts to establish sound grounds for bringing the suit. It rejects out of hand Judge Weinfeld's salutary view that "the basic question is whether the attorneys in good faith believed there was good ground to support the charges . . ."

CONCLUSION.

For reasons already stated, the decision of the Court of Appeals is an aberration. It exalts and expands technical requirements to the detriment of justice. It represents a major step toward the immunization of entrenched corporate management from accountability for their acts. It denies elementary equal protection of the laws, by barring as plaintiffs numerous uninformed and ill-educated stockholders who, of necessity, must rely upon their financial mentors and attorneys.[10]

There can be no justification for closing the doors of the courts to poorly-educated and uninformed stockholders, unless on the cynical view of Plato's sophist in *The Republic* that "the unjust is lord over the truly simple."

The importance and novelty of the issues presented and the impossibility of reconciling the view of the Court below of the role of a plaintiff-stockholder in a derivative suit with

10. The Court's error is not only one of policy and principle, but also of detail. Thus, the Court asserted repeatedly the requirement that the plaintiff be able to identify the roles of individual defendants (App. A 24, 35 *infra*). Why? How does this protect the integrity of derivative suits? Would the case be different if Mrs. Surowitz could recite that the defendant Robert Caverly is a vice-president and director of Hilton Hotels Corporation?

the views expressed by this Court constitute good reasons why this Petition should be granted. If stockholders' remedies against improper activities by corporate officers and directors are to be circumscribed by importing into the Federal Rules a comprehension test—which must be met as a prerequisite to bringing the corporation's cause of action to court—this Court should do the circumscribing. The law should not be left in the parlous state in which the Court of Appeals appears to have placed it, *where the right to sue turns on a preliminary determination of the plaintiff's state of mind, aptitude, and skill in deposing.*

It is therefore urged that this Petition be granted.

Respectfully submitted,

SIDNEY M. DAVIS,
280 Park Avenue,
New York, N. Y. 10017,

RICHARD F. WATT,
WALTER J. ROCKLER,
DAVID R. KENTOFF,
105 West Adams Street,
Chicago, Illinois 60603,

ALAN J. ALTHEIMER,
LIONEL G. GROSS
HOWARD L. KASTEL,
1 North La Salle Street,
Chicago, Illinois 60602,
Attorneys for Petitioner.

APPENDIX A.

OPINION OF COURT OF APPEALS.

MARCH 11, 1965.

Before CASTLE, *Acting Chief Judge*, SWYGERT, *Circuit Judge*, and MERCER, *District Judge*.

MERCER, *District Judge*. Plaintiff, Dora Surowitz, prosecutes this appeal to review an order of the court below dismissing her complaint in a stockholder's derivative suit.[1]

Plaintiff, the owner of 100 shares of the capital stock of defendant, Hilton Hotels Corporation, filed this suit on behalf of herself and all other shareholders similarly situated praying certain relief against the individual defendants as hereinafter delineated. The defendants named in the complaint are Hilton Hotel Corporation, Hilton Credit Corporation, and certain individuals who are officers and directors of Hilton Hotels.

The complaint charged that the individual defendants had defrauded Hilton Hotels of large sums of money in violation of their fiduciary obligations under state law and in violation of the Securities Act of 1933 and the Securities and Exchange Act of 1934. Such fraudulent acts are alleged to have been done through two transactions. In the first of those transactions it is alleged that the individual defendants, as the officers and directors of Hilton Hotels, caused that corporation to offer to purchase and to purchase 300,000 shares of its own common stock at

1. Our reasons for this conclusory statement in spite of the fact that eight counts of the complaint are based upon the federal securities statutes are hereinafter analyzed.